



POLICE DEPARTMENT

September 15, 2011

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Rafael Perdomo
Tax Registry No. 942338
46 Precinct
Disciplinary Case No. 85796/09

The above-named member of the Department appeared before me on March 24, 2011, and April 29, 2011, charged with the following:

1. Said Police Officer Rafael Perdomo, assigned to the 46th Precinct, while on duty, at about 2225 hours on May 15, 2008, at [REDACTED] Bronx County, used excessive physical force against Rodolfo Pacheco, to wit: While Respondent was attempting to arrest Mr. Pacheco, Respondent struck Mr. Pacheco in the head with a pair of handcuffs.

P.G. 203-11 Page 1, Paragraph 2 USE OF FORCE

2. Said Police Officer Rafael Perdomo, assigned to the 46th Precinct, while on duty, at the date, time and location in Specification #1, did fail to make Activity Log entries regarding the incident relating to the arrest of Rodolfo Pacheco.

P.G. 212-08, Pages 1 2 ACTIVITY LOGS, COMMAND OPERATIONS

The Department was represented by Nancy Lichtenstein, Esq., Department Advocate's Office, and the Respondent was represented by Stuart London, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

COURTESY • PROFESSIONALISM • RESPECT

DECISION

The Respondent is found Not Guilty of Specification No. 1 and Guilty of Specification No. 2.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Rodolfo Pacheco, Yrcania Rodriguez, Therisa Russell and Minor D [redacted] as witnesses.

Rodolfo Pacheco

Pacheco is currently a retail worker for Columbia University, where he works in food services, and has done so for the past eight years. He does not have a criminal record but has been "locked up" for marijuana violations. On May 15, 2008, Pacheco arrived at his sister's residence in the Bronx, [redacted] with Therisa Russell, Person A [redacted] and a co-worker named Person B [redacted] at approximately 9:45 p.m. Pacheco's sister lives on the fifth floor, Apartment [redacted]. Upon arrival, the group entered the apartment and stayed inside for about twenty minutes. The group then went into the hallway to "put in a request for a haircut" from a barber who was giving haircuts in the hallway.

After approximately 15 to 20 minutes, three police officers came up the stairwell and into the hallway where the group was standing. Pacheco testified that he and his friends were standing in the hallway alongside of the barber, as well as the person who was in the chair, when the officers approached the hallway with a friend of theirs from the neighborhood. Pacheco testified that this friend was walking in front of the officers,

and when the officers entered the hallway from the stairwell, one of the officers “pushed the gentleman over to the side,” and then “grabbed Person A [REDACTED] who was closer to the steps and pushed him against the wall.” Pacheco asked the officer what the problem was, but “there was never a straight answer given.” Pacheco told the officer that they lived in the building and that some friends were visiting and the officer told him to “shut the F up.” Pacheco described the officer as short and stocky. The officer then told another officer to hold Person A [REDACTED] while he approached Pacheco from about five or six steps away. Pacheco testified that as the officer approached him, he “pushed [Pacheco] up on the wall.” Pacheco was then facing the wall, and he told the officer that he had identification and that he lived in the building.

The officer told Pacheco, “[O]h you want to keep on talking;” to which Pacheco replied, “[I]f you’re not giving me a reason to actually let me know why I am being pulled up, I got the right to ask.” The officer then took out his handcuffs, wrapped them around his knuckles and struck Pacheco on the top of the head, just above the forehead. Pacheco ducked out of the way of the officer’s swing, causing the strike to land on the top of Pacheco’s head. The officer struck Pacheco on the head with the handcuffs three times while he was pinned against the wall. The officer then banged Pacheco’s head against the wall several times. The entire incident lasted for about ten minutes, at which point Pacheco was arrested and taken to the precinct. Pacheco testified that he did not know the reason for his arrest.

When Pacheco arrived at the precinct, an ambulance came and his head was inspected. An emergency medical technician (EMT) told him that they would “most

“likely” take him in to treat his head and asked him for his signature. When Pacheco turned around, the EMTs were gone. His brother, Person C was taken to the hospital.

At his court appearance three days later, Pacheco pled guilty to Disorderly Conduct and was sentenced to ten days of community service. After being released from court, Pacheco went directly to the hospital because he had refused medical treatment at the precinct. At that point, his head was throbbing a little, but Pacheco “didn’t really pay much attention to the pain.” The doctors cleaned him up and gave him pills “in case of headaches,” but no stitches were administered nor diagnosis given (Department’s Exhibit 1, Pacheco’s medical records, dated May 17, 2008). Pacheco went to the hospital upon his release because he was unsure of the severity of the wound and wanted to know if it had become infected during the three days he was in jail.

On cross-examination, Pacheco acknowledged that he pled guilty to Disorderly Conduct at his court appearance but denied that he did anything wrong. He said that he complied with the officers on the day he was arrested. Pacheco was told at his court appearance that if he did not plead guilty to Disorderly Conduct, he would have to remain in jail until his trial. He admitted that he was under oath when he pled guilty, but he “really [wasn’t] guilty of anything” and just pled guilty to get out of jail and move on with his life.

Pacheco denied smoking marijuana or being high at the time of his arrest. He could not recall anyone smoking marijuana in the hallway when the police arrived on the floor, nor at any time while he was in the hallway. Pacheco denied that there was any marijuana smell in either the apartments or the hallway. He did not know if Person A had a white envelope in his hand when the police arrived, but said that Person A was not

rolling a marijuana cigarette at that time. Pacheco said that neither Russell nor his nephew [Minor D] smokes marijuana, and denied that he personally ever saw any smoking or drinking activity. He admitted that he smokes marijuana and that he has pled guilty to Disorderly Conduct for smoking marijuana in the past. On June 22, 2007, Pacheco pled guilty to possession of marijuana; although he could not recall the exact location of that incident, he stated that he has never been caught in or around his building with any marijuana.

Pacheco denied that he had any weapons on him on May 15, 2008, but acknowledged that a gravity knife is a weapon. He could not recall telling the Civilian Complaint Review Board (CCRB) that he had a gravity knife on his person on that day, but said he might possibly have had one on him for "work purposes" or for a reason that he "didn't realize" [Respondent's Exhibit (RX) A, marked for identification, Property Clerk's Invoice P124204 for a silver and black gravity knife, owned by Rodolfo Pacheco, dated May 15, 2008]. Pacheco denied owning a personal gravity knife, but stated that he uses knives at work to cut delivery boxes and admitted that he carries a knife in his pocket while at work sites. Although he still could not recall admitting to CCRB that he was carrying a gravity knife, he acknowledged that if he did say that to CCRB, it would have been an honest admission.

Pacheco stated that when the police arrived on May 15, 2008, himself, [Person C] Russell, [Person B] [Person A] [Minor D] and the barber were present in the hallway, and acknowledged that the hallway was "pretty crowded." The barber lives in the apartment directly next to Pacheco's sister's apartment, and he was cutting hair in the hallway. The barber was set up next to his apartment door, using a regular house chair without any sort

of special drop cloth to catch hair falling to the ground. Pacheco stated that when the police arrived, **Minor D** was getting a haircut from the barber.

Pacheco stated that his independent recollection of the first officer to come up the stairs was that he was “Hispanic or mixed most likely,” short, “nice body weight,” and was not wearing glasses. He stated that the officer did not have hair, but he could not recall whether or not he had any facial hair. Pacheco is 5’7” tall and weighs 135 lbs; he said that the officer was about his height but weighed more than him. When the officer came up the stairs, he first grabbed **Person A** who was standing right by the steps. Pacheco stated that he did not know why the officer grabbed **Person A**. Pacheco did not see the officer pick up a marijuana joint, or a white envelope fall to the ground, before the officer put **Person A** against the wall. Pacheco stated that the officer dealt with **Person A** and put him in handcuffs “pretty quickly,” and acknowledged that it happened “probably within a minute or so.” **Person A** did not resist arrest and was complying with the officer. No females got in the way of that arrest, nor were there any females screaming at the officer who arrested **Person A**. Pacheco stated that there was never any questioning by the officers of the people in the hallway, and that the officers came up the stairs “disguised” by a man in front of them who lived in the building.

Pacheco described the second officer to come up the stairs, in comparison to the first officer, as “taller, lighter eyes, bald head, body stock,” and clean-shaven. He stated that the officer’s ethnicity was mixed, but did not know whether it was “black and another nationality.” When this officer came up the stairs, he stood on the side and “didn’t do anything;” he did not go up to anyone in the hallway, and the only time he ever touched anyone was when the first officer asked him to hold **Person A** against the

wall. The third officer to come up the stairs was a female, and she did not go up to anyone in the hallway. She ran back down the steps the moment she saw the first officer go up to Pacheco and strike him with the handcuffs. The fact that she left the other two officers by themselves “surprised” Pacheco. He was not sure whether or not she was there when Person C was handcuffed.

The first officer, whom Pacheco described as “the vicious one,” turned his attention to Pacheco after handing Person A off to the second officer. Pacheco stated that according to the officer, he was grabbed for simply asking why he was being arrested. When the officer pushed him against the wall, Pacheco did not see a shield, badge or name tag on the officer’s chest. Pacheco did not admit or deny that the reason he did not see those items on the officer’s chest was because Pacheco struck the officer and knocked those items to the ground. Pacheco never saw any of those items fall to the ground, nor did he see the officer reach to pick anything up.

Pacheco was facing the officer when the officer pushed him against the wall and struck him in the head three times using his handcuffs as brass knuckles. The officer struck Pacheco in the front center of his head. Pacheco also stated that the officer struck him in the left ear, although there was no injury, laceration or contusion to the ear aside from the “ring tone.” The medical records do not show any problems with Pacheco’s ear, as he “never went for [his] ear problem.” Pacheco stated that the wall he was pushed against was a chipped stucco wall, and acknowledged that if he was pushed against that wall in a hurried or aggressive manner, it could cause his skin to rip and bleed. He stated that he did bleed, and that there is still blood on the wall consistent to where he was pushed against it by the officer.

Pacheco denied that either Person C or Minor D owns a bat. He never saw Person C in the hallway with a bat, nor did he ever see any bat in the hallway. Pacheco only became aware of the fact that Person C was arrested for coming into the hallway with a bat when he spoke Person C at the precinct (RX B, marked for identification, Property Clerk's Invoice P124211 for a metal baseball bat with a black rubber handle, owned by Person C , dated May 15, 2008). Pacheco denied that Person C came out into the hallway with a bat because Person C was in the hallway the whole time, and Pacheco never saw anyone hand him a bat.

Pacheco stated that Person A was put into handcuffs first, then himself, and then Person C was handcuffed about a minute after Pacheco. Pacheco could not see which officer was arresting Person C because Pacheco was facing the other way. By the time reinforcement officers came up the stairs, all three were already in handcuffs and "almost on the way downstairs." He could not recall which officer led him downstairs, but stated that all three were walked down the stairs together. Pacheco was not sure if the female officer was involved in walking any of them down the stairs. About ten officers were on the fifth floor before the group got downstairs.

Pacheco was then taken to the precinct, located next door to [REDACTED] He could not recall if an ambulance came later to the precinct, or if it was already there when he arrived. He remembered being given a document that stated he would be taken to see a doctor, and he said he signed the document without really reading it. Pacheco then went through the system and saw a judge. He pled guilty to Disorderly Conduct, received a \$75.00 fine and ten days of community service (RX C is a computer printout indicating the final disposition of Pacheco's criminal case, dated May 6, 2009). After

being released, he subsequently went to the hospital. The doctors found no broken bones or fractures, and sent him home with [REDACTED]

Pacheco has not been back to the apartment since the incident, but he has seen both Russell, who is the mother of his two children, and Minor D since then. He has never spoken to Russell about this case, not even after he received the phone call from the Department Advocate's office. Pacheco went to the Department Advocate's office to discuss the case by himself.

On redirect examination, Pacheco stated that he was not bleeding before he was struck in the head with the handcuffs. His chest was pushed against the wall before he was hit in the head with the handcuffs.

On re-cross examination, Pacheco said that the only time his head hit the wall was when the officer grabbed the back of his head and pushed the top front portion of his head into the stucco or rough surface wall. The back portion of his head was never injured. He admitted that a person could rip his head open by simply running into the wall.

When Pacheco was being handcuffed, he was facing the wall and his head was being pushed against the wall. Pacheco denied that he ever prevented the officer from handcuffing him, that he ever put his hands in the air, or that he ever acted in an aggressive manner. Pacheco stated that he would describe his behavior as compliant.

Yrcania Rodriguez

Rodriguez is currently a nurses' assistant at Beth Israel Medical Center. Before she began working at Beth Israel in September 2010, Rodriguez was a probationary police officer with the Department from July 2007 to August 2009. She was terminated for lending her then-fiancé her Department-issued Metrocard. On May 15, 2008, she was working in the 46 Precinct with Officer Gypsy Pichardo and the Respondent. At around 10 p.m., they responded to a radio run for narcotics sales on the fourth floor of [REDACTED]

[REDACTED] When she and the other officers arrived on the scene, there were more than ten people in the hallway. There was a lot of "commotion going on, drinking, [and marijuana] smoking." As she was coming up the stairs, she observed Person A with a letter-sized envelope in his hands which contained marijuana. Person A tossed the envelope on the floor when he saw the police arrive. Pichardo arrested this man first, and when he did so, Person C came out of an apartment and tried to interfere with the arrest by getting in between Person A and Pichardo. Person C was screaming a lot as to "why is [his] brother getting arrested." Rodriguez could not remember if Person C used his hands to try and touch his brother, but she testified that he was trying to physically get between his brother and the arresting officer.

Rodriguez testified that Person C went into the apartment and came back into the hallway with a bat in his hands. Person C was standing about two or three feet from Pacheco and Pichardo. Pichardo then approached Person C to pursue his arrest. At that time, Pacheco tried to intervene with Person C arrest by trying to put his body in between Pichardo and Person C. The Respondent approached Pacheco to try "to get [Pacheco] away so that Officer Pichardo [could] pursue the second arrest." The

Respondent grabbed Pacheco and pushed him against the wall. Pacheco's arms were flailing. This was the first time Rodriguez observed physical contact between Pacheco and the Respondent. While Pacheco's back was against the wall, he then tried to get physical with the Respondent by shoving him and pulling his clothing, and the Respondent's shield and name tag came off of his uniform. The Respondent was trying to handcuff Pacheco while Pacheco was still flailing his arms and being uncooperative. The Respondent was able to handcuff one of Pacheco's hands but Pacheco was swinging his other hand (with the handcuff on his wrist) trying to fight off the second handcuff. Rodriguez then observed the Respondent "bang" the right side of Pacheco's forehead with another set of handcuffs. The Respondent struck Pacheco with his hand in a fist while holding the handcuff inside his fist. After the Respondent struck Pacheco in the head, Pacheco's head was "very bloody." Before the Respondent grabbed Pacheco, Rodriguez did not observe Pacheco with any weapons in his hands, nor did he do anything violent, like try to kick or punch any of the officers.

After she saw the Respondent hit Pacheco with the handcuffs, Rodriguez called for backup because there were "too many of them" and too few officers; she called for backup because of the noise and the commotion in the background. After the incident, Rodriguez brought Person C to the precinct. Rodriguez saw Pacheco at the precinct, and the right side of his forehead was still bloody. EMTs were called, but Rodriguez did not see whether or not Pacheco received treatment.

On cross examination, Rodriguez acknowledged that she was a probationary officer for the duration of her career as a police officer. She was fired during the two-year probationary period and never given a trial for the allegations against her. She

admitted that she gave her boyfriend her Department-issued Metrocard, and that she was aware she was committing misconduct by doing so. Her boyfriend was arrested for using the card in January 2009, and Rodriguez was ultimately terminated for allowing him to use it. Rodriguez was transferred out of the 46 Precinct in July 2008 but did not know the reason for the transfer.

On the date of the incident, Rodriguez responded to a narcotic sales call; she did not know specifically whether the call was for marijuana. When she arrived at the building, she couldn't just "buzz [her] way in," in order to gain access to the building, she waited for someone who lived in the building to come in and she entered with that person. Rodriguez testified that she was walking to the fourth floor of the building, as per what she was told on the radio transmission. She was positive that it was the fourth floor because that was "the one day that [she] will never forget of what happened." Rodriguez admitted that she did not make any entries in her memo book¹ about either the floor she responded to, or the incident at all, because "everything happen[ed] too fast and too much went on," and she didn't make any arrests, anyway. She did not use her handcuffs to arrest anyone, nor did she ever put her hands on anyone who was arrested.

When she and the other officers walked up the stairs, Pichardo was the first officer to come into the hallway, then herself, and lastly the Respondent. Rodriguez acknowledged that Pichardo is a bald, white male, and a "big guy." Rodriguez said that when they entered the lobby of the building, she could smell marijuana, which indicated to her that there was marijuana being smoked in the hallway. When they arrived on the fourth floor, the smell was even more pungent because people were smoking in the hallway. Rodriguez said that she actually saw someone smoking in the hallway but could

¹ Formally referred to as an Activity Log.

not remember who that person was. She acknowledged that Person A had a white envelope in his hands when she arrived on the floor; the envelope was open and there was marijuana inside. She saw Person A drop the envelope to the floor when the officers arrived. At the time Person A dropped the envelope, Rodriguez did not see either Pacheco or Person C in the hallway. She acknowledged that the hallway was crowded, and that she observed people drinking and a lot of smoke. She knew people were drinking because she observed open containers (cups) and bottles of hard liquor on the hallway floor. Person A did not have a cup in his hand, nor did any person "in the case today," but some people in the hallway did have cups in their hands. Rodriguez acknowledged that "according to them" there was a party going on in the hallway; all of the apartment doors were opened and people were coming in and out of the apartments. Rodriguez did not see anyone cutting hair in the hallway at the time.

The first thing that Rodriguez saw Pichardo do upon entering the hallway was order Person A to pick up the white envelope that he dropped on the floor. Person A was compliant with the arrest and Pichardo recovered the envelope. Pichardo rear-cuffed Person A without incident and the arrest took "a few seconds." Rodriguez acknowledged that her memory of the incident today is possibly better than it was on November 5, 2008, during her first official Department interview at CCRB. In the interview, Rodriguez stated that she could not recall whether or not Person A was cooperative, and also that Person A arrest took two to three minutes. Rodriguez admitted at the current proceeding that she would like to change her testimony regarding Person A arrest time from a few minutes to a few seconds.

While Person A was being arrested, Person C came out with a bat to interfere with that arrest. Rodriguez acknowledged that he came out holding the bat in a menacing manner, "looking to hurt someone." During her Department interview, Rodriguez stated that a female came out to interfere verbally with the arrest of Person A. On cross-examination, Rodriguez admitted that she never mentioned Person C interference with the bat to CCRB, and acknowledged that she made a mistake by leaving it out.

According to Rodriguez, the Respondent then approached Person C told him to put the bat down, and put him in handcuffs. Although she could not remember the size of the bat, Rodriguez acknowledged that the bat was aluminum and that it was vouchered. She further acknowledged that there was no problem, in her opinion, with the arrest of Person C because he posed a danger to herself and the other officers. Rodriguez testified that Pacheco then came to interfere with the arrest of his brother. She said that Pacheco could see the bat, and that he knew Person C was being arrested because of the bat.

Person C was compliant, and no force was necessary when the Respondent arrested him. Rodriguez said that the Respondent used his own handcuffs for the arrest of Person C. When Pacheco came to interfere with Person C arrest, Rodriguez acknowledged that Pacheco was "being aggressive," "fighting," and that he gave the Respondent "a really hard time."

Rodriguez acknowledged that as an officer in that situation, where Pacheco was interfering with an arrest, she is allowed to use some force. She acknowledged that when Pacheco "took a swing" at the Respondent and ripped the officer's name tag and shield to the ground, that would be considered an assault on a police officer. Rodriguez was positive about her testimony regarding this, and said that Pacheco would be lying if he

said he never did those things. She further acknowledged that he would be lying if he said that there was no marijuana smoking or drinking going on.

Rodriguez said that when the Respondent's shield and name tag fell to the ground, she recovered them and handed them to the Respondent. She then went to assist the Respondent in his arrest of Pacheco; she put her hands on Pacheco when he was not being compliant with turning around to be handcuffed. Rodriguez was standing next to the Respondent and the two of them were facing Pacheco. She was unaware whether Pichardo was still in the hallway at that time, or whether backup had arrived, because there was too much going on. Rodriguez waited until everyone was handcuffed and left the hallway with the other officers and the prisoners. She acknowledged that Pacheco would be lying if he said that she ran downstairs in the middle of his handcuffing.

She acknowledged that while Pacheco was swinging his arm with the loose handcuff around his wrist, that loose handcuff could have been used as a weapon against either herself or the Respondent. She did not know how many handcuffs the Respondent had with him that day and she did not remember the Respondent asking her for a pair of handcuffs to use. She said she saw the Respondent with "another pair" of handcuffs in his hand, which he used to strike Pacheco. She acknowledged that that pair could not have been his first pair, as those had been used to handcuff Person C and they could not have been his second pair, as those had been used to handcuff one of Pacheco's wrists. She did not know where the third pair of handcuffs came from, and did not remember if they were hers.

Rodriguez acknowledged that she called for backup but denied giving the wrong address. She said that she personally gave the correct address, [REDACTED] but

, when she got to the precinct, the responding officers told her the address they received was [REDACTED] She said that the other officers may have misunderstood due to all the noise and commotion in the background. Rodriguez initially said that she was the only officer to call for backup, but then when she was asked to confirm that the mistaken address, if any, had to have come from her, she said that she also heard Pichardo call for backup. She said again that there was a lot of commotion going on, and maybe Pichardo didn't hear that she had already called for backup. She then stated that she was not sure whether she or Pichardo called for backup first, but both calls were made before she assisted the Respondent with the arrest of Pacheco.

She stated that all three people had been handcuffed before any of the assisting officers arrived on the scene. During her CCRB testimony, Rodriguez stated that she had already left the scene before Pacheco was handcuffed and that she did not know whether or not other officers assisted in that arrest. On cross examination, Rodriguez stated that she did not remember those questions or answers that she gave in her CCRB testimony. She stated that her interview testimony was inaccurate and that she wanted to change her testimony. She acknowledged that the interview was in 2008, the same year as the incident, but that her memory has gotten better as time has gone by.

She denied that she never put her hands on Pacheco or assisted in his arrest at all. She denied that she was of no assistance to the other two officers, and that they walked all three prisoners out by themselves because she was nowhere to be found when the incident happened. Yet, during her testimony at CCRB, she never indicated that she put her hands on Pacheco, nor did she ever indicate that she picked up the Respondent's shield and name tag off the floor.

Rodriguez acknowledged that Pacheco's conduct was the opposite of compliant while he was being dealt with by Pichardo. She further stated that Pacheco would be lying if he said he was being compliant at that time. She acknowledged that the hallway wall was concrete and would be capable of breaking the skin if an individual's face or head was pushed up against it. She denied ever seeing any blood on the wall of the hallway, and stated that Pacheco would be lying if he said there was blood on the wall.

When the incident was over, Rodriguez walked Person C down the stairs in the Respondent's handcuffs. She did not remember who the Respondent walked down, nor did she remember if Pichardo was with them when they walked down. As they were walking down the stairs, the responding backup officers were walking up the stairs and had not arrived into the hallway yet. Rodriguez was aware that a gravity knife had been recovered from Pacheco because she saw it fall out of his pocket while he was sitting on the bench at the precinct. An officer was sitting next to Pacheco, and Rodriguez was right across from the desk officer when the knife fell out. She described the knife as a switchblade that opens with a flick of the wrist. She acknowledged that the knife was vouchered.

On redirect examination, Rodriguez stated that the CCRB investigator never asked her if she picked up the Respondent's badge off of the floor. She saw Pacheco pulling and shoving the Respondent's shirt, and then she saw the shield drop on the floor. She never saw Pacheco punch or kick the Respondent. She did say that Pacheco struck the Respondent by "pushing him, like shoving, grabbing his shirt." She never saw a knife on Pacheco on the scene, and it was her opinion that none of the other officers knew he had a knife on him. Before the Respondent grabbed Pacheco, Rodriguez observed

Pacheco "being physical with Officer Pichardo while he was conducting the arrest of his brother." She explained that Pacheco was being physical by shoving his body between Person C and Pichardo. She never saw Pacheco punch, kick or use any weapons against Pichardo. Rodriguez stated that Pacheco's head was not bleeding before he was hit in the head with the handcuffs. After he was hit in the head with the handcuffs, Rodriguez observed "blood dripping off his injury."

On re cross examination, Rodriguez acknowledged that Pacheco was being very aggressive and putting up a fight with the Respondent. She acknowledged that the Respondent's shield landing on the ground was the result of physical action taken by Pacheco; an action that was part of Pacheco's resisting arrest. At a certain point, the Respondent's shield was on the ground and Pacheco was swinging his arm in the air, presumably using the loose cuff as a weapon. She acknowledged that the loose cuff would have injured her or the Respondent if the cuff had hit either of them. She further acknowledged that Pacheco did not have any weapons in his hands that he brought to the fight, but that he ended up using the loose cuff as a weapon. Rodriguez did not remember if Pichardo assisted in the arrest of Pacheco.

Therisa Russell

Russell is a 26-year old administrative assistant and lives in the Bronx. Her two children, ages three and one, were fathered by Pacheco, but she does not really have a relationship with him at this time. On May 15, 2008, at around 10:25 p.m., Russell was on the fifth floor at [REDACTED] She went to the apartment building with her

newborn baby, Pacheco, Person A and Person B to tell Pacheco's sister that they were going away on vacation to Florida.

When Russell arrived on the fifth floor, she went into the apartment. She said that the apartment door was open and that she also went in and out of the hallway. She testified that there were seven males and five females in the hallway. The males were smoking marijuana and haircuts were being given. Russell saw Pacheco smoking marijuana in the hallway earlier on, but not at the time the police arrived; at that time, she saw another person, whom she described as a "fat guy," smoking. She said that she was in the hallway for about ten minutes when the police arrived because she had just put her daughter to sleep inside the apartment.

When the police arrived on the floor, Russell observed one police officer grab Person A and a second officer grab Pacheco; the officers pushed both men against the wall. She did not know why the officer grabbed Pacheco. Pacheco asked the officer why he was being grabbed and the officer "didn't have a reason." The officer kicked Pacheco's legs apart and pressed him against the wall with his elbow in the back of Pacheco's neck. The left side of Pacheco's face was against the wall. Russell testified that the officer "smashed [Pacheco] on the side of his head," meaning that the officer "took the handcuffs and beat [Pacheco] in the side of the head with the handcuffs." She said that the officer put the handcuffs together and had them across his knuckles. "There came a time when [the officer] swung on [Pacheco] and he just kept hitting him and hitting him until blood just came out of his head." The officer hit Pacheco "enough times for him to bleed" because Russell ran up to him when he started to bleed and put her hands on his head to stop the bleeding. She testified that the blood was coming from the right side of

Pacheco's head. When she grabbed Pacheco, the officers pulled her off of him and told her that she had to let him go. She said that she grabbed Pacheco because the officer kept hitting him and there was blood everywhere: "it was all over the place, it was on the wall, on [herself], on [her] clothes." There was no blood before Pacheco was hit in the head with the handcuffs.

Pacheco was brought to the precinct after he was hit in the head, and at that time Russell went to the precinct to try to find out what had happened. She testified that the officers "didn't really have a legitimate they didn't have an arrest to say he was arrested for this and for that." She asked the officers if Pacheco would be getting medical attention, and she was told that they called for EMTs. The next time she saw Pacheco after the precinct was when he was released from court. That day, Pacheco came home with Russell to bathe and then the two went to [REDACTED] Hospital.

On cross examination, Russell acknowledged that earlier in the day on May 15, 2008, Pacheco was smoking marijuana in the hallway. He was smoking with Person A and the other males in the hallway, but by the time the police arrived at around 10:30 p.m., "all the weed was done, they smoked it all by then." The men, including Pacheco, Person C and Person A finished smoking about 30 minutes before the police arrived. Russell did not remember a white envelope in the hallway, nor did she remember a white envelope in Person A possession. She stated that she was in the hallway when the police arrived and that Person A was not rolling anything when they first came up. She did not know if the marijuana belonged to Person A or where they got it from; "they just had it." She stated that they began smoking at her house and then walked to Pacheco's sister's house where they finished the marijuana. Russell agreed that if Pacheco said he was

, never smoking marijuana in the hallway before the police came he would be lying. She stated that Pacheco lies to her “all the time” and that she has caught him lying in the past. She further stated that it would not surprise her if Pacheco were called a liar.

Russell did not remember if there was marijuana smoke still in the air prior to the officers’ arrival, but she said “probably.” She stated that the group was drinking before they arrived, and that Person A “was the last one with his cup” in the hallway. Russell was not sure exactly what Pacheco was drinking on the date of the incident, but stated that “E & J [Brandy]” is his normal drink of choice. Although she does not drink or smoke herself, she denied that Pacheco would have been drinking and smoking because he had a bad day, and stated that would be indicative of a good day. She stated that Pacheco, Person A and Person B finished a small bottle of the alcohol, but she was unaware if Pacheco did any other drinking after that bottle. She did not see any drinking going on in the hallway except for Person A who was the last one with his cup. She was positive that Person A mixed his alcohol because “he is not a hard liquor straight person.” She did not remember any other males or females with cups in the hallway, but stated that “it’s a common thing” and would be “more than likely.”

Russell acknowledged that there was hair cutting going on in the hallway. She stated that there is always a guy that gives haircuts in the hallway, “they call him the ghetto barber.” He comes and cuts hair in the hallway for five dollars. Russell did not remember whether the barber was smoking marijuana. Russell also did not remember telling CCRB that the barber was “smoking at the time but he was cutting hair.” She did not know whether or not the group was drinking before the police arrived. She stated further that she did not remember telling CCRB that “the group was smoking marijuana

, and drinking alcohol but they stopped.” She said that the group was drinking and smoking, but that Pacheco had his drink before the police came, and that the marijuana was finished before the police came. When the police came, “nothing was going on.” She acknowledged that she spoke to CCRB in June 2008, within 30 days of the incident, and that her memory would have been clearer then than it was now, three years later.

Russell could not describe the first officer to come up the stairs, although she knew that was the officer who grabbed Person A. Russell just knew the officer who grabbed Pacheco, and described him as not that tall, average sized, bald and that he looked Hispanic. She said she could “tell him from anywhere” if she ever saw him again. Russell stated that the first officer grabbed Person A and another officer grabbed Pacheco, and then Person C stepped in “because of the beating the officer gave to Pacheco and [Person C] asked why are you hitting my brother.” Russell denied that Pacheco resisted arrest at any point and stated that he was compliant. She denied that Pacheco ever said “no, you’re not going to handcuff me” and moved his hands. She denied that Pacheco ever ripped the shield off of the Respondent, and stated that Pacheco was faced up against the wall for the majority of the time. Russell denied that the wall was rough, and stated that it was a smooth concrete wall. She said that she never saw Pacheco put his arm in the air with one handcuff on while the officers were trying to secure the second handcuff. She stated that Pacheco never struggled.

Russell stated that Person A was never beaten up by the first officer like Pacheco was, but her main concern was Pacheco. Russell acknowledged that she told CCRB that Person A “got beat up,” but stated at the present proceeding that she never saw Person A get beat up. She just saw Person A and how his face looked after he was released. Russell

saw the first officer go to Person A but never actually saw him put Person A in handcuffs; she just saw him after he was cuffed. She saw Person C walk over to Person A and the arresting officer; Person C asked the officer why he was doing what he was doing, but she did not know whether or not Person C physically got in the way of Person A arrest.

Russell could not say if Person C came back with a bat, but stated that there was a little toy bat present in the hallway. She was not sure if it was wooden or aluminum. She did not remember ever seeing the bat in Person C hands. Russell did remember Person C getting arrested, and she saw an officer put handcuffs on him, although she was not sure if the officer who arrested Person C was the same officer who dealt with Pacheco. She stated that Person A was handcuffed first, then Pacheco and then Person C

Russell denied ever seeing a shield on the ground, but stated that she saw the officer pick something up and put it in his pocket. She did not remember seeing the officer take his own shield off of his shirt himself. However, in her CCRB testimony, Russell stated that “the bald officer” took his badge off and put it in his pocket before grabbing Pacheco. She admitted on cross-examination that she didn’t know or remember if what she told CCRB was true, but stated that if she said it back then, that must have been what happened. Russell said that she remembered the incident because it took place a few days before her college graduation.

Russell denied that she came to testify because she wanted to support the father of her children, stating that she does not want to support him “in the least.” Both she and Pacheco have orders of protection against each other, issued by family court. She stated that Pacheco has never assaulted her, but admitted that they both are verbally abusive towards each other. Russell got the order of protection against Pacheco for the safety of

their children because Pacheco is not around "a good environment." She is never sure what he is doing; he drinks and smokes marijuana, but he does not smoke marijuana in front of the children when Russell is around. Once, a few years ago, Russell "socked him one" when he tried to set her clothes on fire. The lighter ultimately got stuck, so the clothes did not ignite, but Pacheco "had all the cooking oil." She admitted that Pacheco occasionally has an anger problem when he is upset, and further that Pacheco gets angry when he is upset. However, she stated the Pacheco was not angry in the hallway on the date of the incident, and that he was calmer than she expected him to be.

On redirect examination, Russell stated that the entire incident, from the time the officers arrived until the time the officers left, lasted "a while because it all happened real quickly." She could not give an exact amount of time, but stated that after the police arrived upstairs, it was "just a few minutes" before the police grabbed Pacheco. When the Respondent grabbed Pacheco, she was focused on the officer hitting Pacheco. She did not know why the officer was hitting him with the handcuffs.

On re-cross examination, Russell stated that the right side of Pacheco's head was bleeding, and that the blood was going into the right side of his ear. She did not remember seeing any injury in the middle of his head or the top of his forehead. When the officer pushed Pacheco against the wall, the left side of his face was against the wall, not the bloody right side. She stated that the right side of Pacheco's face was never against the wall, but she did see blood on the wall.

Minor D

Minor D is an 18-year-old student in his fifth year at Lehman High School. He lives in the Bronx and works as a teaching assistant at Morris High School. On May 15, 2008, **Minor D** was 16 years old. At around 10:30 p.m. on that date, he was in the fifth floor hallway of his building, [REDACTED] in the Bronx, getting a haircut. Present with **Minor D** in the hallway were his little brother, his two uncles (Pacheco and **Person C**) the barber, **Person A** and his girlfriend, and Russell and her friend. **Minor D** was already in the hallway when Pacheco arrived with **Person A**. The group was in the hallway "just chilling out," and **Minor D** little brother was to get a haircut after **Minor D**. **Minor D** was not drinking or smoking marijuana.

About 15 or 20 minutes after **Minor D** entered in the hallway, "two or three" officers arrived on the floor, and they pushed a man who was walking downstairs. **Person A** was standing next to the wall and the officers pushed him on the wall and cuffed him. Then another officer grabbed Pacheco. **Minor D** testified that the officer "said something to [Pacheco] and then [he] just took the handcuff and slammed [Pacheco]." Pacheco said something like, "Why you arresting me" and the officer just punched him. Pacheco started to bleed and **Minor D** did not know what to do. The officer slammed Pacheco against the wall and started hitting him. Pacheco was facing the wall when he was pushed against it, and the officer hit him with the handcuffs in his closed fist. **Minor D** was not sure how many times the officer hit Pacheco, but knew that he hit him "a few times."

Person C asked the officers why they were doing this. The officer who dealt with Pacheco asked the other officer to hold Pacheco so that he could grab **Person C** and

“that’s when they cuffed [Person C]. After the officer hit Pacheco, [Minor D] saw that Pacheco was bleeding from halfway up the right side of his head. There was blood on the wall. Before the officer grabbed him, there was not any blood on the wall. Pacheco was standing in the hallway having a conversation; he was not doing anything physically violent or threatening. [Minor D] was not arrested, nor was he issued a summons, but he saw [Person A] Pacheco and [Person C] get arrested. He did not know the reason why any of them were arrested.

On cross-examination, [Minor D] initially denied that there was any drinking going on in the hallway, but then stated that he was not sure. Everybody was using little white cups and Robles did not know if “there was something in there.” [Minor D] acknowledged that he was interviewed by CCRB in August 2008, and that most of the incident was fresher in his mind during that interview. In his CCRB interview, [Minor D] said that the group was in the hallway “just listening to music having a couple of drinks.” At this trial, [Minor D] stated that he meant to tell CCRB that people were not drinking in the hallway; everyone was in his house and then they all were having a conversation in the hallway. He then stated that he could not remember if there were cups in the hallway.

[Minor D] acknowledged that he was in the hallway when the police arrived, but he did not remember if it was two or three officers who came up the stairs. One of the officers was a female, and [Minor D] thought that another officer was black. [Minor D] said that the first officer dealt with [Person A] and the second officer to come up the stairs dealt with Pacheco. Initially, [Minor D] said that the first officer to come up the stairs was black, but then stated that it was the second officer. He described the first officer as medium size, and taller than 5’8,” but he was not sure of his ethnicity. This officer grabbed and

cuffed Person A within ten seconds. Minor D did not see a white envelope that Person A was holding fall to the ground. Minor D denied that there was any marijuana smoke in the air when the police arrived and denied that he saw anyone smoking in that area ever.

Minor D stated that while Person A was being arrested, Pacheco was trying to interfere and was asking why Person A was being arrested. Minor D stated that Person C did not try to interfere with the arrest of Person A nor did Person C ever have a bat in his hands. Minor D did see an aluminum bat on the floor of the hallway where Person C was standing because Minor D little brother was “playing in the hallway before.” Minor D described the bat as a little aluminum mini bat.

Minor D acknowledged that the second officer then went up to Pacheco and pushed him against the wall “pretty hard.” He described the wall as rough in some spots and smooth in others. He acknowledged that Pacheco was turned around and that the right side of his face was pushed against the wall. Minor D acknowledged that this officer, dealing with Pacheco, was black, but then stated that he could not really see and all he knew was that the officer’s skin was dark. Minor D stated that Pacheco was handcuffed before Person C. He did not know what the female officer was doing at this time, but said that he never saw her assist the officer dealing with Pacheco, nor did he see her ever put her hands on Pacheco. Minor D admitted that he did not see the female officer do anything.

Minor D denied that Pacheco was resisting arrest, but admitted the he was resisting being handcuffed. Pacheco was moving his arms up in the air and “wiggling” because he did not know the reason he was being arrested. Minor D then admitted that Pacheco was “fighting,” and that that was the word he used in his CCRB interview. Minor D then stated

that he wanted to change his prior testimony and admitted that Pacheco was in fact resisting arrest. [Minor D] denied seeing the officer remove his shield and put it in his pocket, denied seeing the officer's handcuffs fall to the ground, and denied seeing anything fall to the ground. Yet, in his CCRB interview, [Minor D] stated that the officer's handcuffs fell to the floor. At the present proceeding, [Minor D] said that he really did not remember seeing the cuffs fall to the floor. [Minor D] stated that the officer, after he hit Pacheco, took a pair of handcuffs from another officer, and used those to handcuff Pacheco. The officer then "got another cuff and cuffed [Person C]. [Minor D] denied ever seeing Pacheco in only one handcuff. He acknowledged that the other officer needed another set of handcuffs to cuff [Person C]. He stated that the officer got said pair of handcuffs from another officer, but not from the female officer. [Minor D] later stated that he was not sure how the officer obtained this set of handcuffs.

[Minor D] stated that the officer who hit Pacheco threatened to [pepper spray] and hit Pacheco, but he could not remember if the officer actually took out his [pepper spray]. He denied that the officer took out his nightstick. Yet in his CCRB interview, [Minor D] said that the officer took out both his [pepper spray] and his nightstick. Now, [Minor D] said that the officer threatened to spray Pacheco and hit him with the nightstick, but that the officer did not use either of those things.

[Minor D] stated that [Person C] was never attacked by the police, nor did he resist arrest, and further that [Person A] was neither attacked nor did he resist. [Minor D] stated that the black officer hit Pacheco once or twice with the handcuffs, but in his CCRB interview, he stated that the officer hit him only once. [Minor D] confirmed that his CCRB testimony was correct, and that the officer hit Pacheco only once.

[Minor D] recalled that the third officer was a female, but admitted that he remembered this fact so quickly because his mother told him the third officer was a female after [Minor D] CCRB interview. After the CCRB interview, [Minor D] mother explained to him everything that happened, and told him that there were two male officers and one female officer. His mother told him that his uncle (Pacheco) explained everything to her, including that he was hit in the head, but [Minor D] stated that he did not need to be reminded of that fact because he actually saw his uncle get hit. Before the CCRB interview, [Minor D] did not remember that the third officer was a female. He referred to the third officer in his CCRB interview as a male, and made no mention of a female officer. At trial, [Minor D] stated that he wanted to change his CCRB testimony to say that the third officer was a female. [Minor D] admitted that he was changing his testimony "because that would fit in with what [his] mom told [him] what happened."

On redirect-examination, [Minor D] stated that the entire incident lasted about five to six minutes. When the officers arrived, [Minor D] was "just sitting there," and he was focused on Pacheco because he got hit with the handcuffs. [Minor D] explained that when he said Pacheco was fighting, he "wasn't swinging or anything," he was just moving his hands and asking the officer why he was being handcuffed. [Minor D] never saw Pacheco punch or kick the officer who was trying to handcuff him, nor did he ever see any weapons in Pacheco's hands.

The Respondent's Case

The Respondent called Officer Gypsy Pichardo as a witness and testified in his own behalf.

Officer Gypsy Pichardo

Pichardo is currently assigned to the 46 Precinct, where he does patrol. On May 15, 2008, Pichardo was working, in uniform, in a marked van with his partners, the Respondent and Rodriguez. It was not his first time being partnered with either officer. At around 10:25 p.m., Pichardo responded to a radio run indicating a possible crime in progress at [REDACTED]. He remembered that the radio said "smoking marijuana on the fifth floor of the location." The building was the next building over from his precinct. Pichardo did not remember where he was when he received the radio call, but stated that it did not take him long to respond. He did not remember how he gained access to the building, but knew that when he and the other two officers filed up the stairs, he was first, followed by the Respondent and then Rodriguez.

When he approached the fifth floor, Pichardo observed Person A with a marijuana cigarette in his hand. Person A threw it on the floor when he saw Pichardo approaching. Pichardo quickly went to get the evidence and then proceeded to handcuff Person A. The Respondent vouchered the marijuana cigarette, which Pichardo described as "a white cigarette, white rolling paper." Pichardo did not have any difficulty putting Person A in handcuffs, as he did not resist arrest. Pacheco tried to interfere with this arrest by coming up to Pichardo's back while he was putting handcuffs on Person A and asking what Person A was being arrested for. Pichardo answered Pacheco by telling him that Person A was being arrested for the marijuana cigarette, and Pichardo and his partners ordered Pacheco to back off. Pacheco was very close behind Pichardo, where he could have easily grabbed his gun. Pichardo could not remember if they were drinking alcohol, but he did smell marijuana on the floor.

After Pichardo cuffed Person A he heard the Respondent telling Pacheco to back off. Pichardo heard the Respondent's shield fall to the floor and he turned to ask the Respondent what happened. The Respondent told Pichardo that the guy swung on him and knocked his shield off. Pichardo then saw the Respondent struggle with Pacheco against the wall, trying to put handcuffs on him. Pichardo went to assist the Respondent with the arrest, because Pacheco was resisting by putting his hands up against the wall to avoid being handcuffed by the Respondent. The Respondent was holding Pacheco against the wall, with Pacheco facing the wall. At this point, Pichardo did not see anything in the Respondent's hands; he was just trying to grab Pacheco's hands and put them behind his back. Pichardo helped the Respondent in getting Pacheco's hands behind his back, by grabbing Pacheco's arms, but the Respondent was the officer who put Pacheco into handcuffs. Rodriguez did not assist with the arrest, or the other two arrests, and Pichardo stated that he did not see her anywhere in the picture.

As he and the Respondent were struggling with Pacheco, before Pacheco was even in handcuffs, Pichardo observed Person C come from Pichardo's right in the hallway with a bat in his hands. It was a regular-sized aluminum bat, not a small bat, about 32 or 34 inches. Person C was approaching slowly with the bat in his right hand lifted in the air. Pichardo considered this a threat and ordered Person C to put the bat down. Person C was yelling at the police officers, asking them why they were arresting his brother. As soon as the Respondent put Pacheco in handcuffs, he and Pichardo approached Person C and he put down the bat. The Respondent then handcuffed Person C and put him under arrest. Person C did not resist arrest.

At no point did Pichardo see the Respondent take his hand with a handcuff in it and strike Pacheco in the head. He did not see the Respondent strike Pacheco either on the side or the front of his head. Pichardo did see an injury on Pacheco's head when Pacheco was against the wall, but he did not see exactly how it happened. Pichardo did not see how severe the injury was, but stated that when Pacheco turned around after being handcuffed, Pacheco was bleeding. The Respondent used his own handcuffs to cuff Pacheco and Person C. Pichardo used his own handcuffs to cuff Person A.

After all three were put in handcuffs, Pichardo and the Respondent walked them down the stairs and took them to the precinct. Pichardo did not know if Rodriguez walked down the stairs with them; he stated again that he did not see her in the picture and that he was not paying attention to her because she did not get involved in anything. Once back at the precinct, the Respondent processed all three prisoners and Pichardo went to the hospital with Person C who complained of a wrist injury. At no point in time did Pichardo see Pacheco being hit after he was in handcuffs. At no point in time did Pichardo see the Respondent use a handcuff to strike Pacheco in the head area. Pichardo saw the Respondent's shield fall to the ground, but he did not recall how the shield was picked up from the ground.

On cross-examination, Pichardo acknowledged that there were about seven to ten people in the hallway [REDACTED] when he arrived on the fifth floor. He first observed Person A rolling a marijuana cigarette; he immediately approached and handcuffed Person A. While he was handcuffing Person A the Respondent was dealing with Pacheco. At some point, Pichardo turned around and saw the Respondent's shield fall to the ground, but he did not see how it fell to the ground because he was in the

middle of handcuffing Person A. At some point Pichardo observed the Respondent holding Pacheco against the wall, but he never saw the Respondent throw Pacheco against the wall. Pichardo never saw the Respondent hit Pacheco in the head with handcuffs, but he did see an injury on Pacheco's head. Pichardo stated again that he did not know how Pacheco got that injury. Pichardo never saw Pacheco with a knife or any other weapon in his hands. He did not know whether Pacheco was charged with assaulting a police officer because the Respondent was the one who processed the arrest.

The Respondent

The Respondent is currently assigned to the 46 Precinct. On May 15, 2008, he was working, in uniform, in a marked van with his partners, Pichardo and Rodriguez. He was working the 6 p.m. to 2 a.m. tour of duty. The Respondent was assigned to Operation Impact, where his duties were to "drive around and deter crime" throughout the confines of the 46 Precinct. On the date of the incident, the Respondent had been working in Impact for two years. Of the two partners the Respondent had that day, only Pichardo was a steady partner.

At approximately 10:25 p.m. on May 15, 2008, the Respondent and his partners received a radio run at [REDACTED] for the sale of narcotics. When they arrived at the building, the front door was locked. The officers gained access to the building when someone that was exiting the building came down and opened the door. The officers ascended the stairs with Pichardo leading, followed by the Respondent, and Rodriguez third. The Respondent testified that [REDACTED] is "next door pretty much" to the 46 Precinct. He recalled that they were responding to the fourth floor.

When they entered the building, the Respondent heard commotion on the fourth floor, laughing and people talking loudly. The officers proceeded to the fourth floor when they heard the voices. When the Respondent first approached the fourth floor landing, Pichardo was in front of him so the Respondent initially did not see anything. The Respondent saw Pichardo "grab one of the guys that was there" and that was when the Respondent discovered that the man had marijuana on him. The Respondent did not see the actual marijuana at first, but Pichardo told him that the man was rolling a marijuana cigarette. The odor of marijuana got stronger and stronger as the officers were walking up the stairs. The Respondent was able to determine the odor was marijuana because he has made many marijuana arrests in the past and he knows the distinct smell that it has. The Respondent saw clear plastic drinking cups lying around as the only indicia of drinking going on. Other than Person A there were about ten or 12 people on the floor.

After Person A was arrested, the officers "froze the floor," meaning that no one was to move until the officers determined what was going on. Yet, the Respondent did not remember saying that. At that point, the Respondent saw Pacheco try to walk away and go up the stairs. Using his right hand, the Respondent grabbed Pacheco's right wrist to escort him to the wall, and Pacheco began to pull away. Pacheco pushed the Respondent back, putting his hands on the Respondent's chest. The Respondent testified that Pacheco did not like being touched. When Pacheco was trying to pull away from the Respondent, Pacheco "just started swinging." The Respondent could not remember his exact words, but said that he told Pacheco something to the effect of "stop resisting." Respondent tried to turn Pacheco around and move him to the wall so he could frisk him,

but Pacheco did not turn around. At that point, the two were facing each other with Pacheco against the wall. Then Pacheco took a swing at the Respondent, actually hitting the Respondent across the chest, and knocked Respondent's badge off of his chest. The Respondent then pulled out his handcuffs with his left hand. The Respondent testified that he was more concerned with his shield than his own safety at that point because if an officer loses his shield, "it's a big hit." The Respondent tried to grab his shield with his left hand (while holding the handcuffs) and hold onto Pacheco with his right hand, but Pacheco was pushing the Respondent away so the Respondent "forgot about the shield."

At this time, the Respondent did not know what Rodriguez was doing, but Pichardo was "holding onto his arrest." Rodriguez was on the floor, but the Respondent did not remember her doing anything. The Respondent testified that he was focused on Pacheco because he swung at him, and that he was basically fighting with Pacheco one on one. A couple of females were really upset while the Respondent was attempting to cuff Pacheco, and "one of them tried to get in between" the Respondent and Pacheco. The Respondent testified that the area they were in was a small lobby on a small floor, "maybe four apartments;" everything happened in the hallway outside the apartments.

During the struggle with Pacheco, the Respondent was able to spin Pacheco around so he was facing the wall, and the Respondent tried to push him up against the wall. Pacheco was putting his hand up against the wall, trying to push back. The Respondent was concerned that Pacheco would spin back around, so the two would be facing each other again, and Pacheco could get at Respondent's gun, [expandable baton] or [pepper spray]. It was clear to the Respondent that Pacheco was resisting his efforts to be handcuffed. The Respondent did not recall putting the actual handcuffs on Pacheco,

, but he did know that he was holding onto one of his wrists while trying to handcuff him, and that was when he brought Pacheco down to the ground. The two fell to the ground, Pacheco facing down, and the Respondent was able to get handcuffs on Pacheco. The Respondent grabbed Pacheco's arm, handcuffed him, and forcefully grabbed the other arm.

The Respondent then looked up and saw Person C with an aluminum bat. The bat was over Person C shoulder and he seemed really upset. The Respondent told Person C to put the bat down. Person C threw the bat down and the Respondent told him to lay it on the floor. Person C then laid the bat on the floor and the Respondent placed him in handcuffs. The Respondent testified that the bat was a small aluminum bat, for kids, about two feet long. The Respondent usually carries two sets of handcuffs; he said he works in a busy precinct and sometimes needs to double-cuff big guys. The Respondent did not have, nor did he need, assistance in handcuffing Person C because Person C was not "physically a problem."

Somewhere "in between the whole melee," the Respondent got on the radio and requested backup to respond to [REDACTED] He later heard that Rodriguez gave the wrong address over the radio, as [REDACTED] which explained the delay in the backup officers' arrival. The backup officers should have arrived sooner than they did because of the actual building's proximity to the precinct. The Respondent first saw the backup officers when he was escorting the three prisoners down the stairs; the backup officers gained entry into the building when the Respondent and the prisoners reached the first floor. By that time, "everything was over." The Respondent escorted Person C down the stairs, Pichardo escorted Person A and the Respondent could not recall who escorted

Pacheco. The Respondent did not have an independent recollection of Rodriguez walking down the stairs with a perpetrator at that time.

When they exited the building, the officers walked the prisoners to the precinct next door. They lodged the prisoners inside, in front of the desk, and filled out pedigree information. They sat Pacheco down on the bench, and the Respondent said that he saw Pacheco had hurt his head. The Respondent then heard something drop to the ground out of Pacheco's pocket, which turned out to be the gravity knife that was vouchered pursuant to this case. The Respondent testified that he saw an injury on the front of Pacheco's head, around the hairline. He could not recall if the injury was on the right or left side, but said that it was on the top of Pacheco's head. The Respondent saw a little bit of blood. The Respondent guessed that when he had Pacheco against the wall, Pacheco "banged his head against the wall by pushing, going back and forth." The surface of the wall was rough cement. An ambulance was called for Pacheco at the precinct and "they took care of him there." The EMTs did not take Pacheco to the hospital "because it wasn't that serious." Pacheco was then processed.

The Respondent testified that the white and blue envelope containing marijuana was vouchered in this case (RX F, Property Clerk's Invoice P079197 for a white and blue envelope containing marijuana, owned by John Person A dated May 15, 2008).

The Respondent testified that he made entries in his memo book with respect to this incident. Entries are normally jotted down in the memo books as the day goes by if and when an officer receives a job. The purpose of the memo book is to briefly record the activities throughout one's tour. With respect to this incident, the Respondent's memo book entry (RX D) read as follows:

2209 [hours] Narco sale at [REDACTED]
2215 [hours] (84) [arrived at the location]
2225 [hours] 3 under [arrest] @ [REDACTED]
A/O [arresting officer] Perdomo
0400 [hours] EOT [end of tour]

The Respondent testified that his understanding of what needs to be entered in a memo book with respect to an incident is basically the time and type of job received over the radio, time of arrival on scene, and the disposition. The Respondent testified that his memo book contained all of those facts with respect to this incident.

The Complaint Report and Arrest Report are other types of documentation that are filled out with respect to an incident, and they specify in more detail what occurred. The Respondent testified that the Arrest Report for Pacheco (RX E) contained the Respondent's narrative of what happened. The narrative read as follows:

At T/P/O Deft [Defendant] was observed with one clear bag of marijuana in plain view in his right hand. When approached, Deft put marijuana in his pant pocket. Upon attempting to place Deft under arrest did verbally resisted and intentionally swung his hands and body around intentionally preventing A/O from handcuffing him. When MOS placed one hand cuff on wrist Deft continued to swing his hands causing a struggle and which point Deft sustained a small cut to the head. Deft was RMA [refused medical attention] at the precinct. S.I.L.A. Deft in possession of gravity knife from front pocket.

The Respondent testified that his narrative was a little misleading with respect to the defendant, as the individual who possessed the marijuana was not the same individual with whom he struggled when his shield fell to the ground. When he filled out the narrative, the Respondent's intent was to describe what each of the three defendants did with respect to the actual charges, but the Respondent "kind of messed up on the actual

narrative." The Respondent stated that Pacheco never was in possession of the marijuana; the individual in possession of the marijuana was Person A

The Respondent testified that he never struck Pacheco in the head with his handcuffs, nor did he ever use his handcuffs as a weapon to subdue Pacheco. The Respondent qualified the extent of force he used as his hands. He further stated that he used only the force necessary to restrain Pacheco. The Respondent stated that he indicated commands that he wanted to freeze the people on the floor to ascertain if there was anyone else involved in criminal activity.

On cross examination, the Respondent acknowledged that when he first grabbed Pacheco, he did not want Pacheco to leave the scene because Pichardo had just arrested someone for rolling a marijuana cigarette. The Respondent wanted to secure the scene because he smelled the marijuana and did not know who was smoking. He confirmed that at the time he grabbed Pacheco, he did not observe him committing a crime. The Respondent could not remember if Pacheco used an open palm or a closed fist when he struck the Respondent, causing his shield to fall; all the Respondent knew was that Pacheco struck him in the chest. The Respondent was not injured in the struggle and he did not seek medical attention. Pacheco never kicked the Respondent, nor did he display a gun or knife at the time of the struggle. While the Respondent was arresting Pacheco, the Respondent did not know that he had a knife on him because the knife was not found until it fell out of Pacheco's pocket at the precinct.

The Respondent confirmed that Pacheco was flailing his arms and resisting arrest while Respondent was trying to arrest him. The Respondent also confirmed that while he was in the Police Academy, he was taught techniques on how to deal with people who

resist arrest. He was not taught that he could hit somebody with a baton for flailing his arms, nor could he hit somebody in the head with a pair of handcuffs for flailing his arms. The Respondent confirmed that he arrested Pacheco and charged him with Resisting Arrest, Harassment, and Criminal Possession of a Weapon (the gravity knife). He did not charge Pacheco with assaulting a police officer, nor attempted assault, because the Respondent was not injured in the altercation.

The Respondent admitted that in his Arrest Report narrative, he never used the words "assault," "punch[ed]," "hit," or "struck." The Respondent admitted that in his memo book, he did not write down the names of the three people who were arrested at [REDACTED] nor did he write down what each of the three was arrested for. Respondent also made no mention of Pacheco in his memo book; he did not mention that he flailed his arms or that he resisted arrest. The Respondent stated that he traditionally does not get into details like that when he makes entries in his memo book. He confirmed that he did not write a narrative of what happened in his memo book on the date of the incident, even though he was the arresting officer for all three perpetrators. The Respondent confirmed that he filled out all the police paperwork for the arrests, and also that he made no mention of filling out that paperwork in his memo book.

On redirect examination, the Respondent acknowledged that he was taught in the Police Academy that the purpose of the memo book is to refresh an officer's recollection of an event. He was not taught to put every detail that occurred in the memo book; he was taught to put those details in the Online Booking Sheet and/or Arrest Report after the arrest.

FINDINGS AND ANALYSIS

Specification Nos. 1 and 2

The Respondent is charged with using excessive physical force against Pacheco Pacheco in that when he attempted to arrest Pacheco he struck him in the head with a pair of handcuffs. He is also charged with failing to make Activity Log entries regarding the incident with Pacheco.

At the outset, the testimony of the several witnesses for the Department was fraught with inconsistencies. Each painted a different picture of what took place in the hallway when the Respondent, Rodriguez and Pichardo arrived after receiving a radio run that drugs were being used or sold at the location. While they all seem to view the details of Pacheco's actions towards the Respondent differently, they all remembered seeing the Respondent push and strike Pacheco with the handcuffs. But their testimony regarding the actions taken by the Respondent towards Pacheco not only varied from witness to witness but also varied during each witness' testimony.

Pacheco's version was that he was in his hallway with his friends when three officers came up the stairs and immediately pushed Person A against a wall. The Respondent did not respond to Pacheco's questioning as to why they were there and, at that point, the Respondent pushed him against the wall face first. When Pacheco told the Respondent that he had identification and lived in the building, he claimed that the Respondent became angry and pushed him by the back of his head into the hallway wall causing the front of his head to strike the hard stucco-like textured wall. He acknowledged that the wall's surface was rough enough to break open someone's skin just by a person running into it. The Respondent then took out a pair of handcuffs,

wrapped them around his knuckles and struck Pacheco on the top of his head, above the forehead. According to Pacheco, the Respondent continued to strike Pacheco three times with the metal handcuffs while he was pinned against the wall and then banged his head against the wall several more times. He admitted that his injury was to the front of his head and was caused by being struck with the handcuffs and not the wall, even though he admitted that the Respondent grabbed him from the back of his head and pushed the top front portion of his head against the rough surface of the wall. Prior to being struck with the handcuffs his head "was perfectly fine."

Pacheco claimed that he did not see the Respondent's shield or name tag on his chest nor did he see those items fall to the ground or any attempt by the Respondent to pick them up. He said that he was facing the officer when he was pushed against the wall and struck with the handcuffs. He also said the officer struck him in the left ear although there was no visible injury. Pacheco pointed out that there was blood on the hallway wall where the Respondent had pushed his head against. He noted that a female officer (Rodriguez) came up the stairs but she did not go up to anyone in the hallway and ran back down the steps the moment she saw the Respondent go up to Pacheco and strike him with the handcuffs. The fact that she left the other two officers by themselves "surprised" Pacheco. Pacheco was not sure whether or not she was there when his brother Person C was handcuffed.

Pacheco further claimed that he did not know the reason for his arrest even though the charges against him included Obstruction of Governmental Administration, Criminal Possession of a Weapon, Resisting Arrest, Criminal Possession of Marijuana and Harassment.

While at the stationhouse, he stated that an ambulance came. When he was asked if he signed a document refusing medical attention, he claimed to have been given a paper stating "that they was going to take me to the doctor and I just signed it off," but "the honest truth" was that he "really" did not read what the document said. It should be noted that, after claiming that he received a serious beating from the Respondent, he did not insist on being taken to a hospital for medical treatment at that time of his arrest.

Three days later, he pled guilty to Disorderly Conduct and was sentenced to ten days community service. He admitted in his testimony to lying to the judge during his court appearance in that he claimed that he did not do anything wrong but nevertheless pled guilty because he did not want to remain in jail until his trial and wanted to get on with his life. It was only after being release pursuant to his plea that he sought medical treatment at [REDACTED] Hospital because he claimed his head was throbbing and he wanted to know the severity of the wound. He stated that the result of the medical examination was that there were no broken bones and he did not receive any stitches or sutures for any cuts to his head nor was any other treatment necessary. He was given [REDACTED] "in case of headaches." It should also be noted that Pacheco's medical records indicate that the cut to his head was one centimeter, long which is approximately less than one half-inch.

Pacheco insisted under cross examination that he was not smoking marijuana in the hallway at the time of his arrest and could not recall anyone else smoking marijuana or drinking alcohol. Nor did he smell marijuana in the hallway. He did, however, admit to being a marijuana smoker and had, in the past, pled guilty to possession of marijuana. He denied that he was acting in an aggressive manner or that he tried to prevent the

officer from handcuffing him. He also denied seeing a white envelope fall to the floor before Person A was put against the wall and ultimately arrested for possession of the marijuana contained in the envelope. He further denied seeing his Person C with a bat in the hallway. Pacheco testified that the Respondent picked on him because he simply asked why his friend Person A was being arrested.

Former Probationary Police Officer Rodriguez, who admitted to being terminated from the Department for lending her Department-issued Metrocard to her fiancé, was working with the Respondent at the time that they entered the hallway in response to a radio call that there were narcotics being sold at that location. When she arrived in the hallway landing she saw that there were more than ten people there. In direct contradiction to Pacheco claiming that she immediately left the scene, she stated that she remained there and assisted the Respondent and Pichardo during the incident.

In further contradiction to most of Pacheco's testimony, she described the scene as a "commotion going on, drinking, [and] smoking marijuana." She also saw Person A toss a white envelope to the floor which contained marijuana. When Person A was being arrested by Pichardo, Person C came out of an apartment and tried to interfere with the arrest by physically getting in between Person A and Pichardo. Person C then went back into the apartment and came back out with a bat in his hands. Pichardo then went towards Person C to arrest him. According to Rodriguez, Pacheco, unlike his testimony of not being aggressive, intervened with Pichardo's attempt to handcuff Person C by forcibly putting his body in between Person C and Pichardo to separate them. The Respondent then went up to Pacheco, pulled him away from Pichardo and pushed him against a wall as Pacheco's was flailing his arms. Again, contrary to Pacheco's testimony, Rodriguez

testified that Pacheco, with his back to the wall, shoved the Respondent as he was trying to handcuff him, pulling at his clothes causing the Respondent's shield and name tag to come off his uniform and fall to the floor. Pacheco continued to flail his arms and push the Respondent.

Rodriguez saw the Respondent put one handcuff on Pacheco as he was trying to fight off the Respondent's effort to handcuff his other hand. Pacheco was swinging his arms, including the one with the handcuff on it. As Pacheco was swinging his arms she saw the Respondent "banging his forehead with another set of handcuffs." She did not know how many time he struck Pacheco with the handcuffs but observed that Pacheco's head was "very bloody."

Rodriguez first stated that she did not think that the Pacheco's actions were violent because he did not try to kick or "violently punch" the Respondent. She believed that Pacheco was just "intervening" in the arrest of his brother. When further questioned, however, Rodriguez admitted that Pacheco was "being aggressive...fighting" and he gave the Respondent "a really hard time" where Pacheco actually "took a swing" at the Respondent. She stated that the Respondent, in response, struck Pacheco with his hand made into a fist while holding the handcuff inside his fist. At that point, she called for backup because, as she described the scene, there were "too many of them" and too few officers.

She admitted that Pacheco's behavior, including the ripping the Respondent's shield and name tag from his chest, would be considered an assault on a police officer. She also stated that when Pacheco was swinging his hand while the one handcuff was attached to his wrist, that loose handcuff became a weapon against the Respondent.

Rodriguez further acknowledged that the textured walls of the hallway were capable of breaking the skin if an individual's head was pushed up against it. She said that if Pacheco denied being aggressive as she described, then he would be lying.

When it was pointed out that she had told CCRB investigators that she had already left the scene before Pacheco was handcuffed, she claimed that she did not remember giving that answer in that interview. She also denied that she was of no assistance to the officers.

Russell, who is the mother of Pacheco's two children, testified that one of the officers grabbed Pacheco, pushed the left side of his face against the hallway wall and then beat him in the head with his handcuffs. According to Russell, the officer "just kept hitting him and hitting him until blood just came out of his head." She said the blood was coming from the right side of his head and it was "everywhere." She said the officer "didn't have a reason" for grabbing Pacheco. Russell, in contrast to Pacheco's testimony, saw Pacheco smoking marijuana in the hall before the police arrived but not when they arrived. She said that there was "probably" marijuana smoke still in the air when the police arrived and that the group was also drinking in the hall, further explaining that Pacheco, Person A and Person B finished a small bottle of alcohol.

When questioned on cross-examination, Russell said that Pacheco and Person A smoked "all the weed" by the time the police arrived. She did not remember the white envelope in the hallway or in Person A possession. She frankly acknowledged that if Pacheco said he was not smoking marijuana in the hall before the police arrive, he would be lying. She also admitted that he lies to her "all the time" and that she has caught him lying in the past.

Russell denied that Pacheco resisted arrest at any point and stated that he was compliant. While she testified that Person A was not beaten up, she acknowledged that she told CCRB investigators that Person A "got beat up." She also denied that Pacheco ripped the Respondent's shield off his chest or saw it on the floor, but did admit seeing the officer pick something up and put it in his pocket. But in her CCRB interview she stated that "the bald officer" took his badge off and put it in his pocket before grabbing Pacheco.

Russell admitted that she and Pacheco have orders of protection against each other. She got the order against him for the safety of their children because she is never sure what he is going to do because he drinks and smokes marijuana. She recalled that she once "socked him" when he tried to set her clothes on fire. She admitted that he has an anger problem when he is upset but that he was not angry in the hallway on the day of the incident.

She did not know why the officer was hitting him with the handcuffs. She stated that the right side of Pacheco's head was bleeding but did not see an injury to the middle of his head or the top of his forehead. When the officer pushed his head against the wall, the right side of his face was never against the wall, but she did see blood on the wall.

Minor D the nephew of Pacheco and Person C first said that the officer said something to Pacheco and he then just took the handcuff and "slammed" him. As Pacheco was bleeding, the officer slammed him against the wall, face first, and started hitting him. There was blood on the wall. Minor D said that Pacheco was not doing anything physically violent or threatening.

During his further testimony on cross-examination, his testimony became more inconsistent. He initially denied that there was any drinking going on but when he was confronted with his CCRB interview, where he said that the group in the hallway was listening to music and having a couple of drinks, he claimed that he meant to tell the investigator that people were not drinking in the hallway. He then said that he could not remember.

Minor D also said that Pacheco was not resisting arrest but admitted he resisted being handcuffed, explaining that he was moving his arms up in the air and “wiggling” because he did not know the reason he was being arrested. He then admitted that Pacheco was “fighting,” which was also the way he described Pacheco’s actions in his CCRB interview. Then, he wanted to change his prior testimony and admit that Pacheco was, in fact, resisting arrest. He qualified his answer again by stating that by Pacheco fighting, he meant that he “wasn’t swinging or anything” he was just moving his hands and asking the officer why he was being handcuffed.

Minor D denied seeing the officer’s handcuffs fall to the floor or seeing anything fall to the floor. But after he was told that in his CCRB interview he stated that the officer’s handcuffs did fall to the floor, he testified that he really did not remember seeing the cuffs fall to the floor. He also denied seeing Pacheco with only one handcuff on. He claimed that after the officer hit Pacheco, he got another pair of handcuffs from an officer and cuffed Pacheco. He stated that the officer threatened to spray and hit Pacheco, but could not remember if the officer took out his [pepper spray]. While he denied that the officer took out his nightstick in his CCRB interview he said that he took out both his [pepper spray] and nightstick.

He further stated that the officer hit Pacheco once or twice with the handcuffs, but in his CCRB interview, he stated that the officer hit him only once. [Minor D] confirmed that his CCRB testimony was correct, and that the officer hit Pacheco only once. The only reason why he remembered that the third officer was female was because his mother told him so after his CCRB interview. He even testified that his mother told him that there were two male officers and one female officer. She further told him that his uncle (Pacheco) explained everything to her, including that he was hit in the head, but he claimed that he did not need to be reminded of that fact because he actually saw his uncle get hit.

As can be seen, Pacheco tried to convince this Court that he was the model citizen and he was only guilty of attempting to inquire as to why his brother was being arrested. According to him, he did not smoke marijuana or drink alcohol and was not aggressive in any way towards the Respondent. In essence, he was violently beaten by the Respondent for just being there, but, as noted, his injuries did not cause him to seek medical treatment immediately after his arrest. He waited three days to go to the hospital where he was given minimal treatment and [REDACTED]

His story becomes questionable where Rodriguez saw that Pacheco actually attacked the Respondent by physically pushing him and swinging his arm that contained the handcuff in a menacing manner.

Russell reduces Pacheco's credibility even further where she stated that he was, in fact, smoking marijuana and drinking in the hallway shortly before the police arrived and there remained the smell of marijuana in the air as the police entered the hallway. She went as far as saying that Pacheco is a liar and has an anger problem when he is upset.

She even pointed out that he tried to set her clothes on fire. Given his propensity to be enraged, she still insisted that he did not try to resist or do anything for him to be struck with the handcuffs. In addition, her statement that the officer just “kept hitting him and hitting him” and that there was blood everywhere does not jibe with the fact that Pacheco did not seek immediate medical treatment shortly after his arrest and his medical records do not indicate that he received such a violent beating.

Minor D stated that the officer slammed Pacheco against the wall and, unlike Russell’s portrayal of how he was hit several times, **Minor D** admitted that Pacheco was hit only once with the handcuffs. He also stated Pacheco was “wiggling” his arms in the air and described him as “fighting” with the police and resisting arrest. He also said that there was drinking going on in the hall after he first denied that drinking took place.

Minor D testimony is unreliable to this Court because his testimony at trial contradicted what he told CCRB investigators regarding the drinking in the hallway, the Respondent using or not using his nightstick and the number of times the officer struck Pacheco with the handcuffs. The most troubling aspect of his testimony, however, was when he stated that his mother gave him information as to what occurred in the hallway after Pacheco explained to her what had occurred, including that he was hit in the head. This part of **Minor D** testimony leaves this Court to wonder whether he was coached in the details as to what he said took place.

While the testimonies of the Department’s witnesses lack sufficient credibility to support the alleged misconduct by the Respondent, it is clear to this Court that Pacheco did get physically aggressive towards the Respondent after he became angry when he saw his brother being handcuffed. It is also apparent that the Respondent became physical

towards Pacheco in response to his aggressive behavior and that Pacheco suffered a cut to his forehead. Both Pichardo and the Respondent testified as to what occurred in the hallway and they especially noted the aggressive behavior of Pacheco.

Pichardo stated that he saw Person A with marijuana in his hand and quickly handcuffed him. Pacheco tried to interfere with the arrest by approaching Pichardo from behind while he was putting the handcuffs on Person A and asking why he was being arrested. Pichardo told him it was for marijuana and ordered him to step back. Pichardo heard the Respondent tell Pacheco to back off and then heard the Respondent's shield fall to the floor. The Respondent told him that Pacheco swung at him and knocked his shield off. Pichardo then saw the Respondent struggle with Pacheco against the wall trying to put the handcuffs on him. The Respondent was holding Pacheco against the wall face first. Pichardo then assisted the Respondent with handcuffing Pacheco because he was putting his hands up against the wall to avoid being handcuffed. Pichardo did not see anything in the Respondent's hands. It took both of them to get Pacheco's hands behind his back and the Respondent put the cuffs on him. As they were struggling with Pacheco, Pichardo saw Person C come into the hallway with a bat in his right hand. The bat was about 34 inches long. The Respondent then handcuffed Person C. At no point did Pichardo see the Respondent strike Pacheco with his handcuffs. Pichardo did see an injury to Pacheco's head when he was against the wall but he did not see how it occurred. Pichardo did not pay attention to what Rodriguez was doing in the hallway.

The Respondent essentially confirmed what Pichardo testified concerning Person A and Person C. He stated that after Person A was handcuffed, the officers "froze the floor," meaning that no one was to move until they determined what was going on. He then saw

Pacheco attempting to leave the immediate area and go up the stairs. The Respondent grabbed his right wrist to escort him to the wall and Pacheco tried to pull away. Pacheco then pushed and took a swing at the Respondent, making contact with his chest and knocking his shield to the floor. The Respondent attempted to turn Pacheco around and put him against the wall. He also tried to pick up his shield as he held Pacheco but Pacheco was pushing the Respondent and he "forgot about the shield." The Respondent took out his handcuffs as Pacheco was fighting him and dealing with a couple of females in the hallway who tried to get in between him and Pacheco. The Respondent was then able to spin Pacheco around and pushed him face first against the wall. The Respondent remembered holding one of Pacheco's wrist while he was trying to cuff him. At one point, he brought Pacheco to the ground and was then able to put the handcuffs on him.

The Respondent testified that he never struck Pacheco in the head with the handcuffs nor did he use the handcuffs as a weapon to subdue him. He stated that he only used the force necessary to restrain Pacheco.

This Court finds that Pacheco displayed violent behavior towards the Respondent as he was in the process of doing his duty while responding to a call of drug sales in the hallway of the location in question. Pacheco had no right to attack, the Respondent, a police officer, and the Respondent had every right to use physical force to subdue and arrest Pacheco. This Court also finds that even if the Respondent had handcuffs in his hands while defending himself against Pacheco's violent attack it would not be practical to expect him to ask Pacheco to stop his assault while the Respondent cleared his hands of what he was holding so as to insure that his attacker would not be injured while he was assaulting him.

In addition, there was no indication that Pacheco was severely beaten as he and his witnesses testified because he was treated at the scene and not taken to the hospital and, as previously indicated, the medical records did not indicate there was serious injury to his head.

With regard to the Respondent failing to make Activity Log entries regarding the incident with Pacheco; he did make a reference to the arrests that took place at the location but he made no mention of the violent event that took place between him and Pacheco. This Court finds that he was required to give a somewhat detailed account of what occurred between him and Pacheco, not only as a future personal reference as to what occurred but because the Department requires that such an event must be memorialized when such an event takes place.

Based on the foregoing the Respondent is found Not Guilty of Specification No. 1 and Guilty of Specification No. 2.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). The Respondent was appointed to the Department on July 10, 2006. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Respondent has been found Guilty of failing to make a detailed Activity Log entry for the violent encounter he had with an individual during the course of effectuating an arrest of that individual. In a very similar case, *Disciplinary Case No. 84900/09*, a

ten-year detective with no prior disciplinary record pleaded guilty to making insufficient Activity Log entries in conjunction to being found not guilty of a much more serious allegation. A recommended penalty of Reprimand was disapproved by the Police Commissioner and the charge was dismissed in favor of a Schedule "B" Command Discipline (See *Police Commissioner's Memorandum* dated May 13, 2010).

This Court, which is bound to make a recommendation according to the Administrative Code, recommends that the penalty for this one specification be a Reprimand.

Respectfully submitted,



John Grappone
Assistant Deputy Commissioner Trials

APPROVED



SEP 10 2012
RAYMOND W. KELLY
POLICE COMMISSIONER

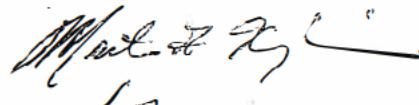
POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER RAFAEL PERDOMO
TAX REGISTRY NO. 942338
DISCIPLINARY CASE NO. 85796/09

In his last three annual evaluations, the Respondent received an overall rating of 4.5 "Extremely Competent/Highly Competent" in 2008, 4.0 "Highly Competent" in 2009, and a 4.0 "Highly Competent" in 2010. In his five years of service, [REDACTED] and has made over 230 arrests. From December 11, 2008, to December 3, 2009, he was placed on Level I Force Monitoring due to receiving three or more CCRB complaints. On December 3, 2009, he was placed on Level II Force Monitoring as a result of receiving additional CCRB complaints.

The Respondent has no prior formal disciplinary record.

For your consideration.



John Grappone

Assistant Deputy Commissioner Trials